

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 26, 2008 appellant, then a 53-year-old city carrier, hurt his left knee as he opened the door of his vehicle while in the performance of duty. He felt several rapid pops in his knee. By letter dated July 30, 2008, OWCP accepted appellant's claim for a tear of the medial meniscus and sprain of the medial collateral ligament of the left knee.² It informed him about his entitlement to compensation benefits and his responsibility to return to work. Appellant was advised that compensation benefits were only payable when he could not perform his job duties due to his injury and to immediately notify OWCP when he returned to work. OWCP explained that he was to immediately return any payments that he received for any portion of the period after he returned to work to prevent an overpayment of compensation.

Appellant was paid wage-loss compensation by check and was placed on the periodic compensation rolls.

On August 5, 2008 OWCP authorized left knee arthroscopic surgery which appellant underwent on August 8, 2008.

The employing establishment advised OWCP that appellant returned to full-time work on September 15, 2008. On October 2, 2008 appellant returned to his regular work duties as a city carrier with no restrictions. He received compensation checks dated October 3, 2008 for the period September 13 through 25, 2008 and October 31, 2008 for the period September 26 through October 25, 2008.

On October 7, 2009 OWCP made a preliminary determination that an overpayment of \$3,558.45 arose because appellant received wage-loss benefits for total disability from September 13 through October 25, 2008, after he returned to full-time work on September 15, 2008. It found that he was with fault in creating the overpayment because he was advised in the July 30, 2008 letter that he was not entitled to compensation for total disability when he returned to work. Appellant was informed of his options if he wished to challenge the fact of overpayment or to request waiver of recovery of the overpayment. He was advised to submit, within 30 days, financial information by completing an overpayment recovery questionnaire (Form OWCP-20).

On October 12, 2009 appellant requested a decision based on the written evidence. He contended that the overpayment was not his fault. Appellant stated that, following his left knee surgery, he did not receive any compensation for one month. He believed that since his payments were delayed 30 days he was entitled to the checks he received after his return to work. Appellant contended that he satisfied his reporting obligation when he notified the employing establishment's health and resource management office of his return to work. In a completed

² In an October 5, 2009 decision, OWCP granted appellant a schedule award for two percent impairment of the left lower extremity for the period October 26 through December 5, 2008.

Form OWCP-20, he reported total monthly income of \$4,760.00 and expenses of \$3,615.00. Appellant had a total of \$1,321.00 in his checking and savings account.³

By letter dated November 6, 2009, OWCP requested that appellant submit additional financial documents to support the information provided on his Form OWCP-20. On November 16, 2009 appellant submitted the requested financial documents. He alleged that he did not have any money to repay the overpayment and doing so would cause him great financial stress.

On October 6, 2010 OWCP determined that the \$3,558.45 overpayment was incorrect and must be voided. It found that appellant returned to full-time work on September 15, 2008 and full-time full-duty work on October 2, 2008. Appellant received compensation for his days off on September 13 and 14, 2008, as well, as from September 26 to October 25, 2008. By letter dated October 6, 2010, OWCP advised him that the October 7, 2009 preliminary overpayment determination was set aside based on its receipt of new information.

On October 13, 2010 OWCP issued a preliminary determination that an overpayment of \$3,694.76 arose because appellant received wage-loss benefits for total disability from September 13 through October 25, 2008, after he returned to full-time work on September 15, 2008. Appellant received \$1,226.78 in gross and net compensation for the period September 13 to 25, 2008. OWCP further indicated that he received \$2,920.92 in gross compensation for the period September 26 to October 25, 2008 and after deducting health benefits insurance (HBI) of \$391.68, basic life insurance (BLI) of \$34.29 and optional life insurance (OLI) of \$26.97 he received net compensation in the amount of \$2,467.98. It added \$1,226.78 and \$2,467.98 to calculate a \$3,694.76 overpayment in compensation for the period September 15 to October 25, 2008. OWCP found that appellant was with fault in creating the overpayment because he was advised in the July 30, 2008 letter that he was not entitled to compensation for total disability when he returned to work. Appellant was advised of his rights in the event he disagreed with the preliminary finding. OWCP requested that he submit, within 30 days, financial information by completing a Form OWCP-20.

In a November 30, 2010 decision, OWCP finalized the \$3,694.76 overpayment and finding of fault. It found that appellant did not respond to the October 13, 2010 preliminary decision and he did not contest the finding of overpayment and fault. Appellant was advised to either forward a check for the entire amount of the overpayment within 30 days or to contact OWCP in order to arrange a repayment plan.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁴ FECA, however, also places limitations on an employee's right to receive

³ The Board notes that appellant incorrectly calculated the value of his total assets. Appellant had \$1,256.00 in a checking account and \$65.00 in a savings account which totaled \$1,321.00 rather than \$1,311.00 as he reported.

⁴ 5 U.S.C. § 8102(a).

compensation benefits. Section 8116 provides that, while an employee is receiving benefits he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁵ OWCP regulations further state that compensation for wage loss due to disability is available only for the period where an employee's work-related medical condition prevents him or her, from earning the wages earned before the work-related injury.⁶ A claimant is not entitled to receive temporary total disability and actual earnings for the same period. OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work at regular salary but continues to receive wage-loss compensation.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$3,694.76. The record reflects that appellant returned to full-time work at the employing establishment on September 15, 2008. However, he continued to receive compensation benefits for wage loss until October 25, 2008. OWCP determined that the amount of compensation appellant received for the period September 13 to October 25, 2008 totaled \$4,147.70 and, after deducting HBI of \$391.68, BLI of \$34.29 and OLI of \$26.97, an overpayment existed in the amount of \$3,694.76. Because appellant received regular full-time wages from the employing establishment during the period September 13 to October 25, 2008, he was not entitled to disability compensation from OWCP for the same period. The Board finds that his receipt of dual payments created an overpayment of compensation.

There is no contrary evidence nor does appellant contest the fact and the amount of the overpayment. The Board finds that he received an overpayment of \$3,694.76 from September 15 to October 25, 2008.

LEGAL PRECEDENT -- ISSUE 2

According to section 8129(a) of FECA, adjustment or recovery shall be made under regulations prescribed by the Secretary of Labor when an overpayment of compensation was made because of an error of fact or law.⁸ The only exception is if the individual is without fault in the creation of the overpayment and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.⁹ A recipient is at fault in the creation or acceptance of an overpayment if he has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect;

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.500(a).

⁷ *L.S.*, 59 ECAB 350 (2008); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 2010).

⁸ 5 U.S.C. § 8129(a).

⁹ *Id.*

- (2) failed to provide information which he or she knew or should have known to be material; or
(3) accepted a payment which he or she knew or should have known to be incorrect.¹⁰

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the overpayment because he accepted a payment which he knew or should have known to be incorrect and applied the third criterion listed above. To establish that he was at fault, OWCP must establish that at the time he accepted the compensation check in question he knew or should have known that the payment was incorrect.

In this case, appellant received compensation by check which indicated the date of compensation entitlement and also received wages from the employing establishment from September 13 through October 25, 2008. In a July 30, 2008 letter, in which OWCP notified him that his claim was accepted, OWCP clearly advised him that he was to immediately inform OWCP upon his return to work to avoid an overpayment in compensation and that, if he worked during any period covered by a compensation payment, he had to return the payment to OWCP. Under these circumstances, appellant knew or should have known that he could not receive wage-loss compensation during any period that he worked or continued to receive wages from the employing establishment.¹¹ OWCP was notified that he returned to work on September 15, 2008. Appellant, however, did not return the compensation he received by checks dated October 3 and 31, 2008, for the period September 13 through October 25, 2008. The Board finds that he should have known at the time he returned to work on September 15, 2008 and began to receive wages from the employing establishment, that he was not entitled to concurrently receive wage-loss compensation for the same period and had an obligation to return a payment that he knew or should have known was incorrect.¹² Under section 10.433(a) of OWCP's regulations, appellant is at fault and is not entitled to waiver of the overpayment in compensation.¹³

Appellant contended before OWCP and on appeal that the overpayment was not his fault. He stated that he acted in good faith and notified the employing establishment's health and resource management office about his return to work. Appellant further claimed that, because his compensation benefits were 30 days late following his employment-related August 8, 2008 left knee surgery, he thought that the payment he received represented compensation to which he was entitled. Even if OWCP was at fault for issuing compensation checks after he returned to full-time work on September 15, 2008, this fact does not relieve him from liability for repayment of the debt if he was at fault for accepting the payment he knew to be incorrect.¹⁴ Additionally,

¹⁰ *B.H.*, Docket No. 09-292 (issued September 1, 2009). 20 C.F.R. § 10.433(a).

¹¹ *Neill D. Dewed*, 57 ECAB 451 (2006).

¹² *Id.*

¹³ *Id.* The Board also notes that had appellant been found without fault, he would not be entitled to waiver because he did not submit requested financial information, even though provided an overpayment questionnaire.

¹⁴ *R.H.*, Docket No. 09-1981 (issued June 11, 2010); *M.J.*, Docket No. 09-469 (issued August 24, 2009).

given the clear indication on each compensation check of the period covered, appellant knew or should have known that the checks he received after September 15, 2008 were not late payments for compensation due 30 days earlier. The Board finds, therefore, that he accepted compensation he knew or should have known that he was not entitled to receive from September 13 to October 25, 2008 after he returned to work. Since appellant is at fault on the issue of overpayment, recovery cannot be waived.

Appellant further contended that repayment of the overpayment would cause him financial hardship since his wife was unemployed, his paycheck was being garnished and he was repaying a large medical bill. The Board notes that it does not have jurisdiction to review OWCP's determination of recovery by lump-sum payment. The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.¹⁵ As appellant was not in receipt of continuing compensation, at the time the final decision was entered in this matter, the Board lacks jurisdiction to review recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment from September 13 to October 25, 2008 in the amount of \$3,694.76. The Board further finds that OWCP properly found that he was at fault in the creation of the overpayment and, therefore, not entitled to waiver.

¹⁵ *Judith A. Cardio*, 55 ECAB 348, 353 (2004).

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 27, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board